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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 711

THE AETNA CASUALTY AND SURETY COMPANY,
a corporation,
Petitioner,

vs.

KISHWAUKEE SPECIAL DRAINAGE DISTRICT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF AND ARGUMENT IN SUPPORT THEREOF.

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OCTOBER TERM, A. D. 1944.

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KISHWAUKEE SPECIAL DRAINAGE DISTRICT,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The Aetna Casualty and Surety Company, your Petitioner, respectfully shows:

I.

SUMMARY OF THE MATTERS INVOLVED.

This is a suit in equity filed in the District Court by the Petitioner herein against the Respondent.

The original Complaint filed in this cause was a bill in equity in the nature of a Creditor's Bill and in aid of Execution (Rec. 2). By leave of Court an Amended Complaint was filed designated as Count II (Rec. 12). By the Amended Complaint, Petitioner sought to recover from Respondent, by way of subrogation to the claims of certain judgment creditors of Respondent, for the amount Petitioner was required to pay as surety on the official bond of the Treasurer of Respondent, on account of the wrongful diversion of funds in the custody of said Treasurer, to the payment of the claims of said judgment creditors.

II.

SUMMARY OF FACTS.

The Respondent, Kishwaukee Special Drainage District, hereinafter referred to as the District, was organized in 1906 under the provisions of the Illinois Statute, Chapter 42, known as the "Farm Drainage Act", Sec. 134, et seq.

The territory comprising the District is located in DeKalb County, in the vicinity of the City of Sycamore, the County Seat.

Under the provisions of said Act the County Clerk is ex-officio Clerk of the District, and the County Treasurer is ex-officio Treasurer thereof, and the affairs of the District are conducted by three Commissioners elected by the landowners. Such a District is organized by the voluntary petition of a majority of the adult land owners in the proposed district, who shall be the owners in the aggregate of more than one-third of the lands within said proposed district.

Under said Act a Drainage District, when so organized, shall be a body corporate and may sue and be sued.

In 1908 the Respondent District issued special assessment Bonds in the sum of $27,000.00, which were sold by the District.

In March 1923 William D. Masterson and others, holders of the balance of the unpaid bonds of the issue of 1908, recovered judgments in the Circuit Court of DeKalb County against the Respondent District, for various sums aggregating $16,024.20 (Rec. 27). Certified transcripts of these judgments were attached to the Motion for Summary Judgment, as Exhibits 1 to 7, both inclusive (Rec. 31 to 42, inc.). These judgments will be hereafter referred to as the Masterson judgments.

On October 15, 1923, pursuant to a resolution recorded on the records of said District, the Commissioners of said District issued special assessment bonds in the aggregate sum of $16,000.00 for the alleged purpose of making repairs on the works of said District, and the same were sold to Adamson and others, and are referred to herein as the Adamson bonds. The funds derived from the sale of these bonds were unlawfully diverted to the payment of the Masterson judgments.

In 1929 the Adamson bond holders filed a suit in the U. S. District Court against the Commissioners, Treasurer, and the District, to establish a trust on account of the funds paid into the Treasury of the District as the proceeds of the 1923 bonds, and to impress a trust on any funds in the hands of the Treasurer from the special assessments levied and collected and then in the hands of the Treasurer, on account of said bond issue of 1923. The basis of said suit

was the unlawful diversion of the trust funds, being proceeds of the 1923 bonds, to the payment of the Masterson judgments, instead of said funds being used in making repairs on the works of said District as provided in the resolution under which the same were issued.

As the result of said suit and a subsequent suit filed against the Petitioner, as surety on the bond of William Decker, Treasurer of said District, judgment was rendered against the Petitioner for $18,758.06, which was paid October 12, 1934 (Rec. 43).

On November 25, 1938 an amendment to the original Bill of Complaint was filed, designated as Count II (Rec. 12), by which the Petitioner sought re-imbursement by way of subrogation to the claims of the Masterson judgment creditors, obtained against the Respondent in the Circuit Court of DeKalb County, and which were paid by the illegal diversion of funds obtained by the District from the sale of the 1923 bonds, which in the litigation which followed were held to have been illegally issued and sold. It was charged that as a direct result of said illegal diversion of funds the Petitioner was held liable as surety on the bond of the Treasurer.

The Findings of Fact and Conclusions of Law were entered by Chancellor Woodward April 16, 1942 (Rec. 60 to 63). Before the entry of the Judgment or Decree on the Findings, Chancellor Woodward died and the cause was transferred to Mr. Justice Campbell, who entered final Judgment or Decree in conformity with the Findings and Conclusions of Chancellor Woodward on April 16, 1943 (Rec. 205-6) granting the relief prayed for in the Amendment designated as Count II of the Complaint.

The Respondent was adjudged and decreed to pay to the Petitioner $22,913.24, and in the event it did not have sufficient funds on hand from which to make such payment, or any part thereof, to levy a Special Assessment against the lands within said Respondent District to pay the same.

From that Judgment or Decree an appeal was taken to the Circuit Court of Appeals, where the same was reversed (Rec. 243). Dissenting Opinion by Mr. Justice Evans (Rec. 250). (143 Fed. (2d) 471.)

A Petition for re-hearing was filed on July 1, 1944 (Rec. 256). On July 17, 1944 said Petition for re-hearing was denied (Rec. 257).

By this Petition a review is sought of the Judgment last mentioned.

The Opinions of the Circuit Court of Appeals (Rec. 243-255) are reported in 143 Fed. (2d) 471.

III.

Jurisdiction.

(1) The date of the Judgment or Decree sought to be reviewed was May 20, 1944 (Rec. 255-6). Petition for re-hearing denied July 17, 1944 (Rec. 257). Time for filing Petition for Certiorari extended by this Court to December 1, 1944.

(2) The Statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 (a) Judicial Code (U. S. C. A. Vol. 8, Title 28, Chap. 9, Sec. 347) providing for the granting of Writ of Certiorari by this Court to review a final judgment or decree by the Circuit Court of Appeals of the United States. See also *Forsyth*

v. *Hammond*, 166 U. S. 506; 41 L. Ed. 1095; 17 Sup. Ct. Rep. 665.

IV.

Reasons Relied On For Allowance Of Writ.

(1) The majority opinion of the Circuit Court of Appeals (Rec. 243) held that the important and controlling questions involved were: "(1) Was plaintiff entitled to be subrogated to the rights of the Masterson judgment creditors? and (2) Even so, was it as such subrogee entitled to a judgment, satisfaction of which could be forced by a special assessment levy?"

Both of these questions were answered in the negative. In the dissenting opinion of Mr. Justice Evans, the first was answered in the affirmative.

(a) The holding of the lower Court on the first question appears to be in conflict with the general rule as to the right to subrogation announced in 60 Corpus Juris pages 698-699, Sec. 6; pages 728-729, Sec. 37; page 740, Sec. 49; page 763, Sec. 63; 50 Am. Juris. pages 683-685; *Amer. Surety Co.* v. *Bethlehem Bank*, 314 U. S. 317.

(b) The decision of the lower Court as to the second proposition appears to be in conflict with numerous decisions of the Illinois Supreme Court, and of the Federal Courts which will be cited and commented upon in the Argument.

(c) The effect of the decision of the lower Court is to sanction the collateral attack on the Masterson judgments, contrary to the great weight of authority.

This will result in great confusion as to the rights of a judgment creditor to enforce a judgment against a drainage district, and is in conflict with the decisions of the Supreme Court of Illinois on that subject, as will be pointed out in the Argument.

V.

Specification Of Errors.

(1) That the Court erred in holding that the rights of the Petitioner to be subrogated to the claims of the Masterson judgment creditors was determined in the suit of Adamson bond holders against the Respondent in the U. S. District Court (Cause 9306) Rec. 245-246.

(2) That the Court erred in holding that the Petitioner was not entitled to be subrogated to the claims of the Masterson judgment creditors.

(3) That the Court erred in holding that even though the Petitioner was entitled to be subrogated to the claims of said judgment creditors, still, the Petitioner could not enforce said judgments against the Respondent District.

(4) The Court erred in holding that the validity of the Masterson judgments could be attacked in this collateral proceeding.

(5) The Court erred in holding that no valid special assessment could be levied against the lands in the Respondent District to pay the Masterson judgments.

(6) The Court erred in holding that the judgment of the District Court directing the levy of a special assessment against the lands of said District was invalid.

WHEREFORE, your Petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals, Seventh Circuit, commanding said Court to certify and send to this Court, a full and complete transcript of the record and of the proceedings in said Circuit Court of Appeals, had in the case numbered and entitled on its docket No. 8406, *The Aetna Casualty and Surety Company, Plaintiff, Appellee,* v. *The Kishwaukee Special Drainage District, Defendant, Appellant,* to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to the Court may seem proper.

Dated .....

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NO.

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KISHWAUKEE SPECIAL DRAINAGE DISTRICT,
Respondent.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION.

I.

OPINIONS OF THE COURT BELOW.

The Findings of Fact and Conclusions of Law of the District Court are set out in the Record at pages 60 to 63, and the Judgment or Decree on the Findings appears at pages 205 to 207 of the Record.

The opinions of the Circuit Court of Appeals of the Seventh Circuit appear on pages 243 to 255 of the Record, and are reported in 143 Fed. (2d) 471.

II.

JURISDICTION.

The matter has been set forth in the Petition, Division III, and is hereby adopted and made a part of this Brief.

III.

STATEMENT OF THE CASE.

This has been covered in the Petition under Division II and is hereby adopted and made a part of this Brief.

IV.

SPECIFICATION OF ERRORS.

The errors relied on are set forth in the Petition under Division V and are hereby adopted and made a part of this Brief.

V.

ARGUMENT.

Summary of Argument.

(a) That the Court below erroneously held that the Decree of the District Court in the Cause No. 9306 was *res judicata* as to the right of Petitioner to subrogation to the claims of the Masterson judgment creditors. Page 11.

(b) That the Court below erroneously held that Petitioner was not entitled to be subrogated to the rights of Masterson judgment creditors against the Respondent District. Page 13.

(c) That the Court below erroneously held that even though the Petitioner was entitled to be subrogated to the rights of the Masterson judgment creditors, it could not enforce said judgments against the Respondent District. Page 14.

(d) That the Court below erroneously held that the Masterson judgments could be collaterally attacked in this proceeding and could not be enforced by a special assessment. Page 16.

V.

Point A.

The Court below erroneously held (Rec. 245) that the judgment in Cause No. 9306 determined the rights of all

the parties to the present suit, and bars the right of Petitioner to the relief prayed for.

The Masterson judgments were rendered against Respondent in March, 1923. In October, 1923 Respondent, pursuant to a supposed resolution, issued bonds in anticipation of a special assessment for the purpose of making repairs to the works of the District.

Those bonds were sold to Adamson and others, who are referred to as the Adamson Creditors.

In 1929 these creditors filed in U. S. District Court, Cause No. 9306. Said suit was predicated on the theory that the money paid for the 1923 bonds constituted a trust fund which could only be used for making repairs on the works of the District as provided in the supposed resolution passed by the Commissioners of the District as the basis for issuing the bonds, and that if not so used, the money should be returned to the bondholders; that said funds were diverted and used in the payment of the Masterson judgments, which constituted a breach of trust for which the Commissioners and Treasurer were liable. No claim was made that the District was liable to the Adamson bondholders for anything except the funds then in the hands of the Treasurer from the collection of the special assessments which were levied for the supposed purpose of paying said bonds.

Neither the Petitioner nor the Masterson judgment creditors were parties to said suit. The validity of the Masterson judgments was not in issue, nor was the right of the Petitioner to subrogation involved in any manner whatever. Hence we respectfully submit that the judgment rendered in Cause No. 9306 was not *res judicata* as to any of the issues involved in the present suit.

Point B.

It is the contention of the Petitioner that when the Respondent District unlawfully diverted the funds secured from the sale of the 1923 bond issue, to the payment of the Masterson judgments, the liability of the Petitioner, as surety on the Treasurer's bond, to the Adamson Creditors, was thereby created. That by the payment of the judgment against it, Petitioner became entitled to be subrogated to the rights of the Masterson Creditors, whose claims against the Respondent District were in effect paid by the Petitioner.

The general rule as to the right to subrogation is well stated in 60 Corpus Juris, Pages 728-9, Sec. 37, as follows:

> "As a general rule any person who, pursuant to a legal obligation to do so, had paid, even indirectly, for a loss or injury resulting from the wrong or default of another will be subrogated to the rights of the creditor or injured person against the wrong doer or defaulter, persons who stand in the shoes of the wrong doer or others, who as to the payor are primarily responsible for the default."

The same rule is announced in *American Surety Co.* v. *Robinson,* 53 Fed. (2d) 22.

It is admitted by Respondent in its Answer to the Motion for Summary Judgment (Rec. 52) that the 1923 bonds were illegally issued and sold. It is clear that by the use of the funds thus illegally obtained in the payment of the Masterson judgments, the liability of the Respondent was shifted from the Respondent to the Petitioner.

Under this situation the Respondent District should not now be heard to say that, admitting that the wrongful and

fraudulent acts of its officers and agents in the handling of its finances resulted in the discharge of the judgments rendered against it and the corresponding loss to Petitioner, still, as between the Respondent and the Petitioner, the latter has no right to reimbursement from the Respondent District.

Hence we respectfully contend that the Court below erroneously held that the Petitioner was not entitled to be subrogated to the rights of the Masterson judgment creditors to obtain reimbursement for the amount it was required to pay as the result of the admittedly illegal manipulation of its finances.

Point C.

The Court below erroneously held that the Masterson judgments were illegal and could not be enforced against the Respondent District.

This is a collateral attack on those judgments and is in conflict with the great weight of authority. Under the provisions of the Illinois Statute (Smith-Hurd, Chap. 42, Sec. 136), a Special Drainage District where organized under the provisions of the Act is a body corporate, can sue and be sued, and if a judgment is obtained against such district it can be enforced by a special assessment against the lands within the district.

Bradbury v. *Vandalia Drainage Dist.*, 236 Ill. 36.

Farrow v. *Eldred Drainage & Levee Dist.*, 359 Ill. 347.

Wilcoxen v. *Eldred Drainage & Levee Dist.*, 365 Ill. 249.

Bates v. *Drainage Commissioners*, 273 Ill. App. 335.

Such districts are organized by the voluntary act of the owners of the lands within the district, for their own benefit, and are held to be voluntary quasi public corporations, of the same class as cities, towns and villages. Such corporations are liable for the wrongful and negligent acts of their officers, agents and servants. (See cases cited above.)

Where the Circuit Court has jurisdiction of the subject matter and of the parties in a suit against a municipal corporation, its judgment against the corporation is absolutely conclusive in a proceeding by mandamus to compel the corporate authorities to levy and collect a tax to discharge the same as to the right of the Plaintiff therein to receive, and the duty of the Defendant to pay the judgment.

City of Cairo v. *Campbell,* 116 Ill. 305.

Harmon v. *Auditor of Public Accounts,* 123 Ill. 122.

Danner v. *Highway Commissioners,* 278 Ill. 189-94.

Rothschild v. *Village of Calumet Park,* 350 Ill. 330.

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Moore v. *Town of Browning,* 373 Ill. 583.

United States v. *Bd. of Town Auditors,* 28 Fed. 407-419.

Board of Comrs. v. *Platt,* 79 Fed. 567 (C. C. A. 8th Ct. March 22, 1897).

In *Moore* v. *Town of Browning, supra,* the Supreme Court of Illinois held that in a suit for mandamus to compel a town to levy a tax to pay a judgment, the validity of the judgment could not be attacked on the ground that the original declaration did not state a cause of action.

In *United States* v. *Board of Town Auditors, supra,* the Circuit Court of Appeals, 7th Circuit, held that the validity of a judgment could not be attacked in a mandamus suit to enforce it. The Court held that there was no force in the argument made by Respondent's counsel that the judgment could not be enforced because the town had no authority to create it and therefore had no authority to levy a tax for its payment.

It is also held in case:

> "It can be said that the town has no right to commit a tort against an individual, but if a tort is committed, and a judgment is recovered for damages by reason of such tort, the town is bound to pay the judgment, and so in regard to any judgment which is rendered."

In *Board of Commissioners* v. *Platt, supra,* it was held, page 572:

> "Our conclusion is that in an action to enforce the collection of a judgment or the collection of bonds issued in payment of a judgment against a municipal or quasi-municipal corporation, the judgment conclusively estops the corporation from making the defense that the original indebtedness evidenced by it was in excess of the amount which the corporation had power to create under the limitations of the Constitution of the State in which it was incorporated."

Point D.

The Court below held (Rec. 247) that in determining the rights of the Masterson judgment creditors the Court "need not consider or decide their validity. Assuming their validity, the judgment creditors acquired an empty right unless such judgments were susceptible of enforcement, or, in other words, unless the district could by legal process be compelled to satisfy them."

The Court then holds that the landowners having been once assessed for the purpose of paying the bonds upon which the judgments rest, under the law of Illinois, such landowners cannot again be assessed for the same purpose.

We respectfully submit that there are no cases decided by the Courts of Illinois, based on a judgment against a Drainage District, which holds that such judgment cannot be enforced by a special assessment against the lands of the district.

In *Bradbury* v. *Vandalia Drainage District*, 236 Ill. 36, the Supreme Court of Illinois, held that Drainage Districts organized under the laws of Illinois are voluntary, quasi public corporations, of same class as cities, villages and towns, and as such are liable for the negligent or wrongful acts of their agents or servants, and that a party having a claim based on such negligent and wrongful acts, may sue and recover a judgment against the district. If a judgment is recovered the corporate authorities have the power to levy a special assessment against the lands of the district to pay it.

This rule has been followed in subsequent cases (*Farrow* v. *Eldred Drainage & Levee Dist.*; *Wilcoxen* v. *Eldred Drainage & Levee Dist.*; *Bates* v. *Drainage Commissioners*, *supra*).

In *People* v. *Village of Bradley*, 367 Ill. 301, it was held that where a city or village collects special assessments against which bonds have been issued, and diverts the funds so collected to other purposes, the municipality is liable to the holders of the bonds on account of the funds so diverted.

If Drainage Districts are in the same class as cities and villages and are liable for the wrongful and negligent acts of their officers, agents and servants, then it necessarily follows that if a city or village can be held liable to the owners of special assessment bonds for the wrongful diversion of funds collected from special assessments, so also a drainage district can be held liable for similar conduct to the same extent and for the same reasons. If such principles are properly applied to a Drainage District, then the Masterson judgments were properly rendered, whether based on the bonds or on the negligent and wrongful acts of the officers and agents of the district.

Turner v. *Hunt Drainage District*, 87 Fed. (2d) 167, is cited in the opinion and relied on by the Court below as controlling in the instant case. We respectfully submit that the question of the right to attack the judgment in question was not raised or considered by the Court in that case. The controlling element in the case appeared to be the negligence of the contractor in failing to protect himself by insisting upon the payments of 85% of the amounts due as the work progressed.

The Statute under which the Respondent District was organized provides that when so organized the District shall be a body corporate, and can sue and be sued. Obviously it was the intention of the Legislature by that provision of the Drainage Act to make the lands within the District liable on a judgment against the District. Otherwise it would be meaningless. The Act unquestionably authorizes the rendition of a judgment, but a judgment without any means of enforcement would be no remedy to one who had contracted with the District and who had recovered a judgment for a breach thereof.

In *Wilcoxsen* v. *Eldred Drainage and Levee District*, 365 Ill. 249, it was held, Opinion page 253:

> "It would be a monstrous doctrine to hold that while the intervenor is entitled to a judgment for such damages and the commissioners are compelled to levy an assessment to pay such judgments, yet the intervenor cannot collect that judgment, nor the commissioners collect their assessment to pay it, because, forsooth, the objectors' lands will derive no benefit from the payment of the judgment."

Again on page 254, the Court said:

> "In cases where a judgment has been secured against a drainage district, it is the duty of the corporate authorities of the district, if no funds are available for that purpose, to levy an assessment against the lands of the district to pay the judgment as in the case of other legal obligations."

We respectfully insist that when the court assumed the validity of the Masterson judgments it necessarily held that they were valid claims against the District.

To say that the judgment is valid and binding and yet cannot be enforced, is a contradiction of terms. The rule is universal that when a judgment of a court of general jurisdiction is pronounced, it becomes a legal and binding obligation of the one against whom it is rendered, until reversed or set aside by direct attack. The Masterson judgments being valid, they were legal claims against the District, and it was the duty of the Commissioners in the District to provide for their payment by special assessment, as in the case of other legal obligations, as was held by the Illinois Supreme Court in the *Wilcoxsen* case, *supra*.

We respectfully submit that if the legal liability of the

defendant District on the claims of the Masterson judgment creditors can be inquired into in this collateral proceeding, as held by the court in this case, then any judgment against the Drainage District can be attacked collaterally, no matter what kind of a claim formed the basis for such judgment. The judgment of the Court in the original action would amount to nothing.

The Illinois Drainage Act expressly authorizes suits to be filed against drainage districts. The purpose of that provision of the Statute is obvious. It authorizes the submission of the claims of creditors to a court for determination. But according to the opinion of the Court in the instant case that Statute is a dead letter, and affords the creditor no relief, although the liability of the District has been determined by the judgment of a court of general jurisdiction. The judgment of the court can be entirely disregarded, and the same questions can be relitigated in a collateral proceeding to enforce the payment of the judgment. The application of such a rule cannot be supported as principle or authority. If applied to a judgment against a drainage district, it could with equal propriety be applied to any judgment. Such holding is contrary to all precedents which involve the determination of this question.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a Writ of Certiorari and thereafter reviewing and reversing said decision.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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SUMMARY OF ARGUMENT.

Petitioner Surety Company paid only the Adamson creditors and by such payment acquired only Adamson's rights against the District. Adamson's rights, however, had been litigated and fixed by the terms of a decree in Cause 9306, many years before the present action was instituted. The decree was *res adjudicata* as to Adamson's rights and since Adamson's rights against the District under that decree were satisfied and paid by the District, there were no rights left in Adamson which the Surety Company could acquire by subrogation..... 2

The Adamson creditors had no rights of subrogation to the Masterson claims against the District because they bought their bonds in the open market. The purchase price they paid therefore, never reached the treasury of the District and consequently could not have been used by the District to pay the Masterson bondholders. The Adamson bondholders therefore never had any rights against the District which the Surety Company could acquire by subrogation or otherwise..... 3

It is uniformly held that a surety company cannot use the equitable doctrine of subrogation to obtain reimbursement against one for whose benefit the surety relation was created..... 4

It cannot avail the Surety Company to be subrogated to the rights of the Masterson bondholders against the District because the Masterson bondholders had no enforcible rights against the District. The judgment they obtained in March, 1923, was apparently collusive but in any event it was in violation of the law of the State of Illinois governing drainage districts. That law authorizes special assessments for one purpose only, to improve the property of landholders in the district. The Illinois courts uniformly hold that a drainage district cannot levy a new special assessment to pay a pre-existing debt of the district 5

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vs.

KISHWAUKEE SPECIAL DRAINAGE DISTRICT,
A QUASI MUNICIPAL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

It is at once apparent that the petition assigns no special or important reason for reviewing the judgment. The chief question was one of local law in which the Circuit Court of Appeals followed local decisions.

Summary of Facts.

Petitioner was surety on the official bond of William H. Decker, Treasurer of DeKalb County, Illinois, and as such ex-officio Treasurer of respondent Drainage District. In 1932, Adamson and others, obtained a judgment against

Decker for diverting Drainage District funds. (R. 67, 101.) Decker failed to pay the judgment. The Adamson judgment creditors thereupon sued petitioner on Decker's bond and recovered a judgment (R. 43, 44) which, after affirmance by the Circuit Court of Appeals, petitioner Surety Company paid. It then instituted this action against Decker, its principal, to recover the amount it had been forced to pay for his misconduct. More than a year after commencing this action against Decker, petitioner filed therein a second count in which, for the first time, the Drainage District was made a party defendant. (R. 12-18.) The claim against the District in such second count was grounded upon the theory that the Surety Company could be subrogated to the rights of seven judgment creditors (Masterson claimants) who had obtained judgments against the District and whose bonds (not judgments) had been paid and cancelled more than fifteen years before this action was filed. (R. 12-18.) The events span four decades and are chronologically briefed in the partially dissenting opinion of Judge Evans of the Circuit Court of Appeals, (R. 250) which together with the lucid statement in the majority opinion, (R. 243) may be profitably substituted for the summary of facts offered by this petition.

Answer to Point A, Page 11 of Petition.

Adamson's rights against the District were adjudicated in Cause 9306 six years before petitioner filed this action and the decree against the District satisfied by payment in full of $5,237.49. (R. 80.) Petitioner was the direct beneficiary of such payment for it reduced *pro tanto* the amount which would otherwise have been recoverable in the subsequent action brought by the Adamson creditors against petitioner Surety Company. The contention that petitioner should not be estopped by the decree entered in Cause 9306

because the action sought to impose only a limited liability upon the District is tenuous indeed. The Circuit Court of Appeals pointed out that such a view is refuted by the record. (R. 245.) The Court not only rendered judgment against respondent for a specific amount but also expressly decreed that respondent District could not be subjected to any further liability. (R. 100.) Such contention, moreover, is contrary to the universally accepted rule that the doctrine of *res adjudicata*

> "embraces not only what was actually determined in the former case between the same parties or their privies, but it extends to any other matter properly involved which might have been raised and determined and to all grounds of recovery or defense which might have been presented." *People* v. *Circuit Court*, 347 Ill. 34, 46, 179 N. E. 441, 445.

One of petitioner's favorite assertions, repeated here, is that Adamson's money was used to pay the Masterson judgments and Adamson was, therefore, subrogated to the Masterson rights. That point was or might have been an issue in Cause 9306, and hence it cannot avail petitioner at this late date. The fact is the Masterson bonds and not judgments were paid. (R. 50.) Furthermore, the District never sold the second issue of bonds to Adamson as petitioner asserts. The District sold them to W. W. Armstrong Co., a bond house. Hence, Adamson was a subsequent purchaser. (R. 93.) The Adamson creditors, therefore, cannot be subrogated to the position of the Masterson claimants on any theory that the money Adamson paid for the bonds was used by the District to pay Masterson. *Aetna Life Insurance Co.* v. *Middleport*, 124 U. S. 534, 544.

Answer to Point B, Page 13 of Petition.

Petitioner has always claimed as it does here that the *District* unlawfully diverted the proceeds of the sale of the 1923 bonds. Actually it was *Decker*, for whose integrity petitioner vouched when it became surety on his bond, who diverted these funds. Moreover, that diversion was the specific subject of the suit in Cause 9306 in which the District Court affirmatively passed on the liability of the Drainage District and expressly limited its obligation to respond for such diversion, to the special assessments collected and on hand. In addition it decreed:

> "That the Kishwaukee Special Drainage District lacks authority and warrant in law to levy an additional tax or assessment for the purpose of supplying a sufficient fund in its treasury to pay and discharge the residual balance due on the indebtedness above stated." R. 100.

Decker, as District Treasurer, unlawfully diverted the funds to pay the Masterson bonds. It was for that misfeasance that he was sued and for that misfeasance that petitioner, his surety, was obliged to pay. Now petitioner contends that having assumed the risk for a consideration and having been obliged to respond for Decker's dereliction, it should be granted use of the equitable device of subrogation to force reimbursement as against the property holders of the Drainage District for whose benefit and protection petitioner became surety. For this astonishing proposition no authority has ever been cited. On the contrary the courts have consistently denied a surety the use of the equitable doctrine of subrogation to obtain reimbursement against one for whose benefit the surety relation was created. *American Bonding Co.* v. *Welts*, 193 Fed. 978, 980; *American Surety Co. of New York* v. *Robinson*, 53 Fed. (2nd) 22, 23.

Answer to Points C and D, Pages 14 and 16 of Petition.

The Masterson bondholders acquired their bonds more than thirty years before the decree was entered in this cause. These bonds were, by their terms, a lien upon special assessments to be thereafter collected. (R. 43.) They were a charge upon and payable solely out of such special funds. The special assessments were actually paid by the property holders of the District but had been diverted or otherwise made unavailable when the bonds fell due. After these bonds had been in default for many years, the holders obtained judgments upon them. (R. 31-43.) The court below justly said of these judgments:

> "The circumstances under which they were entered give rise to a fair inference that they amounted to a fraud upon the District." R. 247.

This is a fairly obvious inference from the fact that although by their express terms payable solely out of special assessments the judgments entered upon them were general. Under the Constitution of the State of Illinois a drainage district has no power to create general obligations.

> "In authorizing drainage districts to raise money, the Illinois constitution limits the legislative power to special assessments on the property benefited." *Turner* v. *Hunt Drainage District*, 87 Fed. (2nd) 167, 168.

And even when a judgment is entered upon such special obligations of limited bodies corporate of this character, the Illinois courts refuse to lend their aid to the enforcement of the judgment. *The People* v. *Board of Education*, 386 Ill. 522, 532, 54 N. E. (2nd) 508, 513.

Although justly suspicious of the Masterson judgments, the court below did not, as petitioner asserts, find them void or illegal for it said:

> "Assuming their validity, the judgment creditors ac-

> quired an empty right unless such judgments were susceptible of enforcement, or in other words, unless the District could be compelled by legal process to satisfy them." R. 247.

The Circuit Court of Appeals did not, as petitioner contends, allow a collateral attack upon the Masterson judgments. It was simply unnecessary to decide the applicability of the rule, for these judgments fell into the category of rights that are unenforcible because of the peculiar legal restrictions imposed by the Constitution and statutes of Illinois upon these quasi-municipal corporations. Thus, the Circuit Court of Appeals said:

> "The land owners had once been assessed for the purpose of paying the bonds upon which these judgments rest and it is the settled law of Illinois, so we think, that such landowners cannot again be assessed for the same purpose." R. 247.

Notwithstanding the complication of factual background and circumstance and the unnecessarily wide scope of the argument of counsel, it has never been necessary (for a disposition of the surety company's claim of subrogation to the Masterson rights) to do more than establish a single proposition of law. The basic fact that the landholders of respondent District had already been assessed to pay the Masterson bonds and that the assessments had been paid and collected has always been conceded. (R. 46, 47.) The proposition of law which then becomes decisive of the case in the words of the Supreme Court of Illinois is:

> "When lands have been once assessed for the benefit that will accrue to them by virtue of an improvement, they cannot be re-assessed for the same improvement, regardless of whether the money arising from the assessment was used for that improvement or some other improvement or purpose. *People* v. *Scanlan*, 265 Ill. 609, 107 N. E. 149." *Turner* v. *Hunt Drainage District*, 87 Fed. (2nd) 167, 168.

The insistence of counsel that this is no longer the law of the State of Illinois was thoroughly examined and discarded by the Circuit Court of Appeals. Not even the judge who partially dissented could be induced to adopt petitioner's view that later decisions were to the contrary. We deem it unnecessary to make extended answer to petitioner's contention that the numerous cases supporting the position that the Masterson judgments were unenforcible have been overruled. The fact is that both the Appellate and the Supreme courts of the State of Illinois are still citing as authority the cases which counsel would have us believe are no longer the law. (*City Bank & Trust Co.* v. *Board of Education*, 386 Ill. 508, 514, 54 N. E. (2nd) 498, 501; *O'Neall Co.* v. *Coon Drainage and Levee District*, 319 Ill. App. 324, 334, 49 N. E. (2nd) 283, 287.)

It is, patent that the citations on page 14 of the petition were properly distinguished by the Circuit Court of Appeals. R. 248, 249.

Counsel's assertion at page 19 of the petition that the view of the court below that a judgment may be valid and yet not enforcible is a contradiction of terms, proceeds upon a demonstrable misapprehension of the views of the Supreme Court of Illinois. *Leviton* v. *Board of Education*, 374 Ill. 594, 601, 30 N. E. (2nd) 497, 500; 385 Ill. 599, 607, 53 N. E. (2nd) 596, 599.

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